

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
2000 Biennial Regulatory Review –)	
Comprehensive Review of the)	CC Docket No. 00-199
Accounting Requirements and)	
ARMIS Reporting Requirements for)	
Incumbent Local Exchange Carriers:)	
Phase 2 and Phase 3)	

**PHASE 3 REPLY COMMENTS OF THE
OHIO CONSUMERS’ COUNSEL AND THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

Introduction

The Ohio Consumers’ Counsel (“OCC”) and the National Association of State Utility Consumer Advocates (“NASUCA”) offer these reply comments in response to certain of the comments filed in Phase 3 of the Notice of Proposed Rulemaking (“Notice”) released in this docket on October 18, 2000.¹ The OCC is the statutory representative of Ohio customers of investor-owned utilities.² NASUCA is an association of 42 consumer advocates in 39 states and the District of Columbia. NASUCA’s members -- including the OCC -- are designated by the laws of their respective states to

¹ The comments responded to herein are those of AT&T Corp. (“AT&T”); BellSouth Corporation (“BellSouth”); the General Services Administration (“GSA”); Independent Telephone & Telecommunications Alliance (“ITTA”); Iowa Telecommunications Services, Inc. (“ITSI”); Qwest Corporation (“Qwest”); Sprint Corporation (“Sprint”); United States Telecom Association (“USTA”); Verizon; and Wisconsin Public Service Commission (“WisPSC”).

² See Ohio Rev. Code Chapter 4911.

represent the interests of utility consumers before state and federal regulators and in the courts.

The OCC and NASUCA are pleased to offer these reply comments in this long-range phase of the Commission's inquiry. As explained in the Notice, the Commission seeks

to undertake a broader examination of Part 32 and ARMIS requirements with the goal of determining what additional changes can be made as competition develops, and addressing ultimately what, if any, specific accounting and reporting requirements are necessary when local exchange markets become sufficiently competitive.

Id., ¶ 87. As discussed in the OCC's and NASUCA's previous comments in this docket, the first resort should be to the statute that requires the examination undertaken by the Commission. Phase 3 of this proceeding, like Phase 2, is part of the Commission's inquiry pursuant to the directive of 47 U.S.C. § 161, which requires the Commission biennially to review its regulations pertaining to telecommunications service to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." See Notice, ¶ 10.

The comments of the incumbent local exchange carriers ("ILECs"), i.e., USTA and its members, seeking immediate significant reductions in accounting and reporting requirements make extensive claims about the level of competition. Yet as discussed in the initial comments of the OCC and NASUCA, competition is not ubiquitous and, particularly for residential customers, hardly "meaningful." So long as the incumbent carriers remain dominant in the market, asymmetrical regulation is appropriate and necessary.

The current state of local competition

The OCC and NASUCA are not aware of any evidence that shows that, for residential customers at least, meaningful economic competition exists anywhere in the United States for local service. In their Phase 2 initial comments, the ILECs provided no such information. Neither do the ILECs' Phase 3 initial comments.

USTA asserts that “[c]ompetition is a reality and is increasing at lightning speed.” USTA at 6. USTA cites Bell South’s receipt of pricing flexibility in 39 Metropolitan Statistical Areas (“MSAs”) and Verizon and SBC getting § 271 approval for New York and Texas. *Id.* Yet as discussed in the OCC’s and NASUCA’s initial Phase 3 comments (at 6-8), neither pricing flexibility nor in-region interLATA entry are signs of meaningful competition in the provision of local exchange service, particularly for residential customers. USTA cites the experience of Roseville Telephone Company, having lost “some residential lines ... to competitors.” USTA at 6. USTA’s admission that “it is well documented that new competitors target business customers and generally have not included residential service in their business plans, as of yet...” (*id.*) is indeed telling.³

Verizon states that “the incumbent local exchange carriers face direct competition for both basic telephone service and advanced telecommunications services.” Verizon at 3. It may be true that there are competitors out there; but in many states like Ohio, Verizon’s competitors are barely a hiccup on the market graph, much less representing

³ USTA’s note that “more people are beginning to see wireless telephones as substitutes for their wireline services due to dramatic price decreases and increases in service quality...” (*id.*) only emphasizes that this form of competition is in its infancy.

“meaningful” competition.⁴ The “direct” competition is not “meaningful” throughout Verizon’s entire territory.

USTA asserts that “[w]hile state regulators or the competitors of incumbent LECs may complain that regulatory relief is not warranted because residential competition is not sufficient, that is not the statutory standard.” *Id.* at 9. The OCC and NASUCA, as representatives of and advocates for customers, also believe that major regulatory relief is not warranted because residential competition is minimal. The statutory standard is “meaningful economic competition”; to the extent that competition does not extend to residential customers, those customers still require the protections that were created in the total monopoly environment. To do away with accounting and reporting requirements when there is meaningful economic competition for large business customers but not for residential and small business customers would subject the still-captive customers to the risk of the abuses that the rules were designed to prevent. See *Sprint* at 2. As GSA states, “[a]s long as an ILEC remains dominant in the provision of any essential interstate or intrastate service, uniform and accurate accounting and reporting requirements will remain necessary.” GSA at 4.⁵

⁴ On September 28, 2000 Verizon provided to the Staff of the Public Utilities Commission of Ohio an “Ohio Market Study: Report on Competition in the Local Exchange Service Area of Verizon North Inc.” containing confidential information. The report was filed in fulfillment of a condition imposed by the Ohio Commission in its approval of the Bell Atlantic/GTE merger. See PUCO Case No. 98-1398-TP-AMT, Opinion and Order (February 10, 2000) at 53-54 (available at <http://www.puc.state.oh.us/docket/orders/2000/0206/index.html>).

⁵ *Sprint* states that “in a situation where the ILEC actually has an impact over many of its competitors’ ability to compete, by virtue of the fact that the competitor depends on the ILEC for facilities and service, the Commission should err on the side of caution in releasing regulatory requirements.” *Sprint* at 3. The OCC and NASUCA would hope that the Commission would also err on the side of caution where there are no competitors at all.

Triggers

USTA asserts (at 10) that “[t]he NPRM seems to suggest that accounting and reporting relief should be tied to a competitive showing” as if such a suggestion were drawn from thin air. It is in fact the law that requires a showing of “meaningful economic competition” before a regulation may be repealed or even modified. 47 U.S.C. § 161.

USTA also asserts that “[c]ertainly there are triggers available that signal competition has reached a certain level...” USTA at 9.⁶ Yet USTA identifies only one such trigger: pricing flexibility.⁷

USTA argues that pricing flexibility could serve as a trigger “since the elimination of the [price cap lower formula adjustment mechanism] LFAM required under the plan removes the last vestiges of rate of return regulation from price caps.” USTA at 10; see also BellSouth at 3-5⁸; Verizon at 1, 4-5. As noted by the OCC and NASUCA in initial comments, pricing flexibility, per the *Pricing Flexibility Order*, is granted for interstate special access and dedicated transport services based on a showing of collocation within an MSA.⁹ Pricing flexibility for these services within an MSA does not eliminate the reach of the price caps for other services, or for all services outside the

⁶ A trigger that signals “that an incumbent LEC is embarking on a business strategy that requires greater flexibility” (*id.*) has no necessary connection to the statutory condition for accounting and reporting requirement relief.

⁷ Despite having identified § 271 approval as a sign of competition (*id.* at 6), USTA does not propose using it as a trigger.

⁸ BellSouth would use the grant of pricing flexibility to trigger “full deregulation of accounting and reporting requirements.” BellSouth at 5. BellSouth depends on the grant of pricing flexibility eliminating all vestiges of rate of return regulation (*id.*) rather than the existence of meaningful economic competition, much less the incumbent becoming non-dominant. See WisPSC at 8.

⁹ *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (“*Pricing Flexibility Order*”), at ¶ 77. The *Pricing Flexibility*

MSA. On the other hand, as also noted by the OCC and NASUCA, the *Pricing Flexibility Order* grants flexibility for common line and traffic sensitive service where the competitor provides service using its own facilities to 15% of the incumbent's customer locations in an MSA. *Pricing Flexibility Order*, ¶ 113. Even then, residential customers within the MSA might lack competitive alternatives, and rural customers -- both residential and business -- might also lack alternatives.¹⁰

Another trigger the Commission put out for comment was the granting of § 271 authority. Notice, ¶ 90. The Wisconsin Public Service Commission correctly notes that “Section 271 authorizations, while intended to foster competition, do not guarantee effective competition...” WisPSC at 7; see also OCC/NASUCA Phase 3 Comments at 6-7. The Wisconsin Commission also recognizes that accounting and reporting information “may be needed to monitor the impact of the authorizations, such as interLATA and wholesale revenues, and any performance penalty plan payments.” WisPSC at 7.

USTA states that

[t]he Commission has already adopted several competitive triggers that competition is at a Commission-approved level. Since these triggers do not apply to all incumbent LECs, carriers should be permitted to utilize a trigger that addresses its [sic] current regulatory status, reflects the market characteristic of its serving area and avoids duplicative filing of competitive information.

Order was recently upheld by the U.S. Court of Appeals for the District of Columbia Circuit. *WorldCom, Inc. v. Federal Communications Commission*, CADC No. 99-1395 (February 2, 2001).

¹⁰ It would clearly not be practical to eliminate accounting and reporting requirements only for those MSAs where common line and traffic sensitive pricing flexibility had been granted while maintaining the requirements elsewhere. The effort of “sub-dividing” the requirements in this fashion would outweigh any savings from relaxing the requirements within the MSA. On the other hand, eliminating accounting and reporting requirements on a company-by-company, service-by-service basis would be far more feasible. See WisPSC at 6.

USTA at 10. USTA fails to identify those triggers or give any additional detail on this proposal. The OCC and NASUCA agree that a trigger must reflect the market characteristic of an ILEC's serving area: The key market characteristic is, in fact, the level of competition in the serving area.

On the other hand, AT&T asserts that "the Commission should not consider state-by-state or LEC-by-LEC relief, because such relief would defeat one of the main purposes of the federal accounting rules." AT&T at 3. The OCC and NASUCA certainly agree that national accounting rules are more efficient than individual state rules (see *id.*; see also OCC/NASUCA Phase 2 Reply Comments at 3-5). Yet AT&T's standard would, in effect, not allow removal of any accounting or reporting requirements for any ILEC until there was universal competition for all classes throughout the United States. Section 11 of the Telecommunications Act cannot be stretched that far.

The USTA's "roadmap" lacks consideration of meaningful economic competition.

The USTA provides a detailed "roadmap" for the Commission to follow for accounting and reporting deregulation. USTA at 11-15. It is not necessary to respond to the details of USTA's proposal, because the proposal would require the Commission to deregulate on a specific timetable that has no necessary relationship to the statutory criterion of "meaningful economic competition."¹¹ The Commission cannot "commit to deregulation by 2005 as its Phase 3 objective..." because it may well be that some markets throughout the country may not see "meaningful economic competition" within

¹¹ BellSouth's "Phase 3 Plan" (BellSouth at 5-7) also depends upon a fixed schedule rather than on an assessment of the level of competition in an ILEC's service territory.

four years. Considering the slow progress in the residential sector, 2005 appears to be a very optimistic projection for meaningful residential competition.¹²

ITSI's proposals should be rejected.

In its Phase 2 comments, ITTA had proposed that the Commission should use the “Independent Telecommunications Consumer Enhancement Act of 2000,” H.R. 3850 of the 106th Congress, as the basis for relaxing requirements for the mid-sized carriers. See ITTA Phase 2 Comments at 5-6. ITSI makes this argument in its Phase 3 comments, adding in the consideration that H.R. 3850 has been reintroduced in the 107th Congress as H.R. 496. ITSI at 4. As discussed in the OCC’s and NASUCA’s Phase 2 Reply Comments (at 5-6), these pleas should be disregarded. It would be unreasonable for the Commission to use legislation that has merely been introduced as the basis for its decision here. If the concepts in H.R. 496 are robust enough that they pass both houses of Congress, then they will become the law of the land and the Commission will have to adopt them. The Commission need not accept the premises of H.R. 496 before Congress has acted.

Indeed, ITSI’s use of H.R. 3850/H.R. 496 goes well beyond ITTA’s original argument. ITSI asks the Commission to adopt not only the CAM and ARMIS relief in the bill, but also the other regulatory relief provisions, including “streamlined tariff filings for new services, as well as significant pricing flexibility and even price deregulation if the carrier is subject to facilities-based competition.” ITSI at 5. Quite apart from the dubious

¹² On the other hand, AT&T commits the same sort of error by arguing that the Commission should not waste time on triggers but should rely on the biennial review process to control deregulation. AT&T at 2. The establishment of triggers can be *part* of this biennial review process, and would allow deregulation as

policy basis for these proposals -- which, as noted, will be debated in the halls of Congress -- the proposals go well beyond the scope of this proceeding. Phase 2 addressed “various measures to eliminate or streamline existing accounting and reporting requirements.” Notice, ¶ 2. Phase 3 addresses “more drastic changes to existing accounting and reporting requirements....” and “what, if any, specific accounting and reporting requirements are necessary when local exchange markets become sufficiently competitive.” *Id.*, ¶ 87. Tariffing and pricing flexibility are not issues that should be considered here.

Finally, it appears that a major reason behind ITSI’s generic proposals for mid-size companies are the particular circumstances and regulations applicable to ITSI, rather than mid-sized carriers generally. ITSI states: “Elimination of accounting and pricing regulation will put Iowa Telecom on even footing with neighboring rural independent LECs...” ITSI at i. The problem is that ITSI “is currently experiencing substantial facilities-based competition from CLECs, municipalities and neighboring rural ILECs.” *Id.* at 7. The source of the problem is, according to ITSI, that

[m]any of Iowa Telecom’s competitors are affiliated with rural incumbent LECs that benefit from universal service support, higher interstate access charges and far less regulatory burdens. Unlike these competitors, Iowa Telecom receives no high cost loop or local switching support from the Universal Service Fund. The regulatory framework afforded these rural ILEC competitors allows them to keep local rates at lower levels rendering Iowa Telecom vulnerable to competition, while generating sufficient revenue to make upgrades to their networks and fund overbuilding outside of their franchise territories.

meaningful economic competition develops, rather than waiting on a fixed two-year schedule. See WisPSC at 6.

Id. at 8. In the first place, most of ITSI's competitors are now affiliated with ITSI itself.¹³ Thus the incentive for competition in ITSI's exchanges will diminish.¹⁴

Further, why does ITSI not receive universal service funding? Because of "the inflexible operation of Section 54.305 of the FCC's rules." *Id.*, n.22. Why does ITSI have lower interstate access charges? Because ITSI chose to become a price cap carrier just prior to the CALLS Order; the CALLS Order cost ITSI \$1.2 million in its first year. *Id.* at 8-9.

Hence ITSI is seeking relief from the Commission's accounting and pricing rules as a way around these problems, "in order to level the rural playing field." *Id.* at 10. In the first place, this is a roundabout way to address the problem: ITSI would be better off to seek relief from the Commission's rules and orders that have actually caused the problem.¹⁵ Further, it is not clear how many other carriers are, in fact, "similarly situated" to ITSI.

ITSI's particular and peculiar problems are no reason for the Commission to afford generic relief to all mid-sized carriers. Nor are those problems reason for the Commission to carve out a special regulatory niche for smaller carriers in rural areas that are subject to facilities-based competition. ITSI at 6.

¹³ *In Re: GTE Midwest Incorporated and Iowa Telecommunications Services, Inc.*, Iowa Utilities Board Docket No. SPU-99-29, Order Terminating Docket (April 13, 2000) at 2.

¹⁴ *Id.* at 15.

¹⁵ Another independent source of ITSI's problems is the substantial debt that ITSI incurred in acquiring these exchanges from GTE. See Order Terminating Docket, *supra*, at 6-7.

Asymmetric regulation makes sense.

Verizon asserts that the “continued existence” of the accounting and reporting requirements “tilts the competitive playing field against the incumbent local exchange carriers, who are uniquely burdened by these costly and archaic reporting requirements.” Verizon at 1. The “unique burden” on the ILECs results from the fact that they are in the unique position of being the incumbents. The ILECs have moved from a 100% market share but retain a dominant market share even among business customers; for residential customers in most states, the ILECs retain near-monopoly status. See the OCC’s and NASUCA’s initial Phase 3 comments at 3-4. Further, in the OCC’s and NASUCA’s Phase 2 reply comments (at 8-10), we cast serious doubt on the ILECs’ claims about the burden of the current requirements.

Verizon states “[m]aintaining unnecessary regulations on only one segment of the industry is contrary to the deregulatory purpose of the Telecommunications Act and cannot be justified simply because it has been around for a long time and ‘might come in handy.’” Verizon at 3. Section 11 of the Act makes clear that the deregulatory purpose of the Act -- at least insofar as accounting and reporting requirements are concerned -- must follow competition, not precede it.

The OCC and NASUCA strongly agree with the Wisconsin Public Service Commission when it states, “Although continuing review of the regulatory landscape is appropriate ... asymmetric regulation in a transitional industry is reasonable.” WisPSC at 7. Beyond that, it is necessary.

Conclusion

USTA asserts that “[w]hile there will be many commenters that will claim that these rules can never be eliminated, such statements are not true.” USTA at 8. It is not clear what specific rules USTA is referring to in this context, as the OCC and NASUCA noted in their Phase 3 initial comments, “The growing public interest in the national telecommunications network means that the Commission must maintain some level of accounting and reporting standards to be met by all carriers.” OCC/NASUCA at 4, n.11.

Qwest, for its part, once again seeks to have the Commission adopt Qwest’s view that 47 U.S.C. § 161 (“Section 11”) “establishes a presumption that regulation is not necessary...” Qwest at 3, n.10.¹⁶ This argument was raised by Qwest in its Phase 2 comments (see *id.* at 2); the OCC and NASUCA responded to Qwest’s argument in their Phase 2 reply comments (at 12). At this point, the OCC and NASUCA would reiterate their point that under Qwest’s interpretation, the requirement to show meaningful competition would be mere surplusage.¹⁷ That is clearly not the intention of the Act.

This portion of the Act explicitly requires the existence of meaningful economic competition *before* repeal or modification of regulation is necessary. Deregulation is not a reward for the ILECs allowing competition; neither is it dessert after a meal. See ITTA at 3, n.7. Deregulation is removal of the controls that were placed on monopoly providers, once their market power has diminished to the point where that market power

¹⁶ The remainder of Qwest’s comments address variations on this theme. Indeed, Qwest states that “the Commission should not address the issue of appropriate triggers until it has determined which rules are necessary for it to fulfill its statutory duties. Qwest at 7. The OCC and NASUCA submit that Qwest has it backwards: The Commission should first determine what represents “meaningful economic competition,” and then determine which of its regulations it can dispense with once that condition is reached.

¹⁷ Verizon also reads the language on meaningful economic competition out of the Act. Verizon at 2.

cannot be used to disadvantage consumers or competitors.¹⁸ The notion that deregulation will facilitate competition requires acceptance of the proposition that removing burdens and oversight from dominant carriers will encourage them to become less dominant. Deregulation before competition will allow the dominant carriers to maintain their dominance. That was not a goal of the Telecommunications Act of 1996.

Respectfully submitted,

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¹⁸ ITTA indicates that “the antitrust laws will remain an effective deterrent to predatory pricing and unlawful cross-subsidization...” ITTA at 4. This ignores the reality of the local exchange service business, which is only now emerging from a century of monopolies that had the protection of laws and regulators alike.

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